No. 86-1599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HECTOR REUBEN SANCHEZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Petitioner's constitutional rights were infringed where Petitioner bore no burden of proof during the sentencing phase of his capital trial?

II.

Whether the harmless error doctrine is applicable to constitutional errors made during the sentencing phase of a capital trial?

III.

Whether the trial court properly refused an instruction which would have permitted the jurors to consider mercy as an independent sentencing factor?

IV.

Whether the "risk of non-persuasion" is afforded constitutional protection?

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PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Supreme Court of Illinois insofar as the issues raised by Petitioner do not raise questions of constitutional proportion worthy of review by this Court.

OPINION BELOW

Petitioner seeks review from an Illinois Supreme Court opinion in *People v. Sanchez*, 115 Ill.2d 238 (1986). Petitioner has appended a copy of this opinion to his Petition. The Illinois Supreme Court decided Petitioner's petition for rehearing on January 30, 1987.

JURISDICTION

The jurisdictional requirements have been adequately set forth in the Petition. As treated more fully in the argument contained herein, however, Petitioner has failed to demonstrate grounds for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Ill. Rev. Stat. ch. 38, § 9-1(e) (1985):

Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in subsection (b) may be presented by either the State or

the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rule governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

Ill. Rev. Stat. ch. 38, § 9-1(g) (1985):

Procedure—Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

STATEMENT OF FACTS

On the night of February 3, 1984, Petitioner and an accomplice kidnapped 21-year-old Michelle Thompson from a parking lot in Gurnee, Illinois. (R. 1663-1665)

Petitioner took Ms. Thompson to his home, where he beat, raped and then strangled Ms. Thompson to death. (R. 1679) Petitioner and his accomplice then drove Ms. Thompson to Wisconsin, where they dumped her nude body in a roadway. (R. 1688)

After a jury trial, Petitioner was found guilty of attempted murder, rape, deviate sexual assault, murder, and aggravated kidnapping. (R. 2619)

Having been found eligible for the death penalty, Petitioner was given a sentencing hearing, wherein aggravating and mitigating evidence was given. The evidence in aggravation included testimony regarding Petitioner's shooting, stabbing, and strangulation of his ex-wife. (R. 2716-2722)

Towards the end of the sentencing hearing, the following colloquy took place between the prosecution and Petitioner:

Q. Would you say, sir, that the way that Michelle Thompson was sodomized was ugly and brutal and despicable?

A. Yes.

Q. Tell the jury, sir, what mitigating factors would cause a jury to not oppose the death penalty on facts such as this?

Mr. Collins: I object.

THE COURT: Sustained.

Mr. Collins: If the court please, I would like to be heard on that question, If your Honor, please, there is no possibility that Mr. Margolis thought that last question was a proper question.

It is never the function of defendant to argue his own case. I would suggest that question is so grossly

improper that I move for mistrial at this time.

THE COURT: Denied.

(R. 2909)

After deliberations, the jury found no mitigating factors sufficient to preclude imposition of the death penalty. The court subsequently sentenced Petitioner to death by lethal injection. (C. 426)

The Illinois Supreme Court affirmed Petitioner's judgment and conviction on December 19, 1986.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT INFRINGED WHERE HE BORE NO BURDEN OF PROOF DURING THE SENTENCING PHASE OF HIS CAPITAL TRIAL.

Petitioner's initial assertion is that a burden of proof was improperly placed on him during the sentencing phase of his trial. A brief review of the pertinent facts is necessary to demonstrate that 1) Petitioner's argument is merely a factual one; and 2) Petitioner has not raised a novel question of constitutional law meriting review by this Court.

As Petitioner correctly notes, Illinois law does not place a burden of proof on either party during the sentencing phase of a capital trial. Ill. Rev. Stat. ch. 38, § 9-1(e) (1985). Given that, Petitioner has taken issue with the People's query of him during the sentencing phase of his trial:

"Tell the jury, sir, what mitigating factors would cause a jury to not oppose the death penalty on facts such as this?" (R. 2909)

Putting aside whether this question can accurately be deemed to have placed a burden of proof on Petitioner, the salient point is that Petitioner was not in fact put in the position of answering this question. The question was objected to, and the objection sustained. (R. 2909) Thus Respondent would urge that as this Court considers the various arguments Petitioner has posited in connection with the aforesaid question, this Court remembers that the objection to the question at issue was sustained.

It is also important to bear in mind that both the People and Petitioner informed the jurors several times during the sentencing hearing that neither party bore a burden of proof. For example, immediately after Petitioner's counsel objected to the question at issue, Petitioner's counsel said, "If the court please, I would like to be heard on that question. . . . It is never the function of defendant to argue his own case. . . ." (R. 2909) Petitioner's counsel also later noted in his closing argument that there was no burden of proof in the sentencing hearing. (R. 2938) Finally, the People stated in their closing argument that "The defendant has no burden of proof. There is no burden of proof on anybody. . . ." (R. 2931) Thus, Petitioner's assertion that an impression was left that he bore a burden of proof is without factual basis.

Apart from the fact that Petitioner's argument is not well-grounded in fact, Petitioner has failed to raise a novel question of law worthy of review by this Court. Indeed, instead of attempting to demonstrate that he posits an important and undecided question before this Court, Petitioner simply relies on precedent which in any event is inapposite.

For example, Petitioner relies upon *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Sandstrom v. Montana*, 442 U.S. 510 (1979) in support of his argument that the burden of proof was improperly shifted to him during sentencing.

The predicate question in *Mullaney*, *id.*, and *Sandstrom*, *id.*, is instructive. In both cases, the predicate question was whether a juror could have reasonably believed that a mandatory burden of proof had been shifted to the defendant. *Mullaney*, 421 U.S. at 701; *Sandstrom*, 442 U.S. at 515. In each case, the Court found that the instructions at issue contained improper presumptions that the jurors must have construed as burden-shifting in nature. *Mullaney*, 421 U.S. at 702; *Sandstrom*, 442 U.S. at 517.

In the instant case, however, there is no instruction containing an improper presumption. There is only an ambiguous question which Petitioner was excused from answering. Thus, Petitioner's reliance on *Mullaney* and *Sandstrom* is unavailing.

Petitioner's reliance on *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) is misplaced as well. Petitioner relies on *Caldwell* in support of his argument that the jurors might erroneously have believed that they were not responsible for imposition of the death penalty. Far from supporting Petitioner's argument, however, *Caldwell* well illustrates the tenuous nature of Petitioner's argument.

In *Caldwell*, *id.*, the prosecutor told the jurors in closing that "the decision you render is automatically reviewable by the Supreme Court." 105 S.Ct. at 2638. Clearly there was no question in *Caldwell* but that the jurors were led to believe that they were not wholly responsible for imposition of the death penalty. In the instant cause, however, there was no comparable direction to the jurors diminishing their responsibility. There is only inference,

and that inference is exceedingly speculative. Petitioner's request for review of this issue should accordingly be rejected.

In connection with the aforestated argument, Petitioner argues that to the extent that he was put in the position of arguing his own case in mitigation, he was deprived of his Sixth Amendment right to counsel.

The primary reason this Court should reject this argument is because it was not raised in the state courts.

This Court has affirmed time and again that it cannot and will not exercise jurisdiction over questions which have not been presented in the state courts. *Jones v. Hildebrant*, 432 U.S. 183, 188-189 (1977); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 197 (1965); *see* 28 U.S.C.A. § 1257(3) (1976).

Given Petitioner's failure to comply with this requirement, his assertion should be rejected on grounds of lack of jurisdiction.

Even apart from the jurisdictional issue, Petitioner's Sixth Amendment argument is wholly without merit, primarily because it is without factual basis. Petitioner was asked the question at issue, his counsel objected, and that objection was sustained. How this sequence of events operated to deprive Petitioner of counsel is difficult to discern, and Petitioner has provided no caselaw in support of his argument. The claim should accordingly be rejected.

II.

THE HARMLESS ERROR DOCTRINE IS APPLICABLE TO CONSTITUTIONAL ERRORS MADE DURING THE SENTENCING PHASE OF A CAPITAL TRIAL.

Petitioner asserts that the Illinois Supreme Court erred in applying the harmless error doctrine to the alleged error made during the sentencing phase of Petitioner's trial. Petitioner's claim should be rejected, however, because 1) Petitioner's constitutional rights were not infringed during the sentencing phase of his trial; and 2) if error did occur, it was entirely appropriate to apply a harmless error analysis.

As explained *supra*, at pp. 5 to 6, Petitioner has failed to demonstrate that a burden of proof was placed upon him during the sentencing phase of his trial.

Assuming *arguendo* that there was error, however, this Court has already established principles that address Petitioner's query. In *Delaware v. Van Arsdall*, 106 S.Ct. 1431 (1986), this Court noted that "[t]he harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Id.* at 1463. Thus, if a defendant has been represented by counsel at trial, and if he has been tried before an impartial judge, there is a "strong presumption" that any other errors that may have occurred at trial are subject to a harmless error analysis. *Rose v. Clark*, 106 S.Ct. 3101, 3107 (1986). Indeed, only those errors that effectively abort the basic trial process are deemed to be ineligible for a harmless error analysis. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Payne v. Arkansas*, 356 U.S. 560 (1958) (use of coerced confesstion); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased adjudicator).

Given these perimeters on the scope of the harmless error doctrine, courts have not constrained themselves from applying a harmless error analysis to asserted errors at sentencing. *See United States v. Reese*, 775 F.2d 1066, 1075 (9th Cir. 1985); *Funchess v. Wainwright*, 772 F.2d 683, 693 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1242 (1986) (capital case); *United States v. Rosen*, 764 F.2d 763, 767 (11th Cir. 1985), *cert. denied sub nom. Holmes v. U.S.*, 106 S.Ct. 806 (1986); *United States v. Gomer*, 764 F.2d 1221, 1223 (7th Cir. 1985); *Watson v. Blackburn*, 756 F.2d 1055, 1058 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 2259 (1986) (capital case).

Moreover, it is to be noted that in *Rose v. Clark*, 106 S.Ct. 3101 (1986), this Court affirmed that an instruction shifting the burden of proof to defendant is subject to a harmless error analysis. This Court noted, "When the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the rule serves." 106 S.Ct. at 3107. Likewise, justice would be poorly served if a conviction were reversed on a *per se* basis because a defendant claimed that an unanswered question shifted the burden of proof.

Petitioner's request for review of this issue should accordingly be rejected.

III.

THE TRIAL COURT PROPERLY REFUSED AN INSTRUCTION WHICH WOULD HAVE PERMITTED THE JURORS TO CONSIDER MERCY AS AN INDEPENDENT SENTENCING FACTOR.

Petitioner next argues that the trial court erred in refusing the mercy instruction he proffered, and erred in

giving a "no sympathy" instruction. This sort of argument was recently rejected by this Court in *California v. Brown*, 107 S.Ct. 837 (1987). Petitioner's claim should accordingly be rejected.

In *Brown*, *id.*, this Court affirmed that while jurors may not be instructed to ignore emotional responses which are "rooted in the aggravating and mitigating evidence," 107 S.Ct. at 840, jurors may be properly instructed to avoid basing their decisions on "*mere* sympathy." *Id.* (emphasis in original). The trial court was accordingly justified in refusing Petitioner's proffered instruction which read:

> In considering the death penalty, you may, if you choose to do so, consider whether or not you wish to extend mercy to the defendant.

(R. 2643)

Petitioner attempts to distinguish his case from *Brown* by claiming that the "no sympathy" instruction given at his trial did not make clear that the jurors could consider sympathy in the context of mitigating evidence. However, the considerations that governed in *Brown* govern here.

First, as this Court noted in *Brown*, it seems quite unlikely that jurors might completely ignore mitigating testimony simply because they have been instructed that they should not be influenced by sympathy or prejudice. 107 S.Ct. at 840.

Second, the "no sympathy" instruction given in the case at bar is properly considered only in context. The jurors were instructed not to be influenced by sympathy in the same instruction that directed that they were not to be influenced by prejudice, race, color, religion or national ancestry. It is highly unlikely that the jurors singled out "sympathy" from the other nouns contained in the instruction; it is much more likely, as in *Brown*, that the jurors considered sympathy as merely one of a catalog of con-

siderations that could not be properly considered at sentencing. *See* 107 S.Ct. at 840.

Petitioner's claim is accordingly disposed of under the principles set forth in *Brown*. Having failed to have presented to this Court an important or undecided question, Petitioner's request for review should be rejected.

IV.

THE "RISK OF NON-PERSUATION" IS NOT AFFORDED CONSTITUTIONAL PROTECTION.

Petitioner's final contention is that the Illinois death penalty statute is unconstitutional because, according to Petitioner, the statute places the "risk of non-persuasion" on the defendant. Petitioner's claim is without merit.

Under the Illinois death penalty statute, "[i]f the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." Ill. Rev. Stat. ch. 38, § 9-1(g) (1985). Under the statute, then, neither defendant nor the People bear a burden of proof in a capital sentencing hearing.

Under Petitioner's theory, however, while a defendant may not bear a burden of proof or a burden of persuasion, a defendant does bear a "risk of non-persuasion" in a capital sentencing hearing. Petitioner's theory does not bear scrutiny: If it is true that a defendant bears a risk of non-persuasion at sentencing, that risk is no different from the "risk of non-persuasion" defendant bears during the guilt-innocence phase of his trial. Yet, the "risk of non-persuasion" present during the guilt-innocence phase is afforded no constitutional protection, so long as defendant is not charged with the burden of proving his inno-

cence. *See In Re Winship*, 397 U.S. 358, 364 (1970). The relevant point in the instant case is that Petitioner bore no burden in the sentencing phase of his trial.

Moreover, Petitioner's argument ignores the purpose behind Illinois' sentencing scheme. In *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court made clear that one of its primary concerns regarding death penalty statutes was the danger that the penalty was being imposed capriciously. 408 U.S. at 309-310; 428 U.S. at 198. In that the Illinois death penalty statute provides for particularized decisionmaking based upon the weighing of mitigating factors against aggravating factors, the Illinois statute sufficiently protects against capricious sentencing. The mere fact that neither party bears a burden of proof is not a constitutional infirmity, and Petitioner has not demonstrated otherwise.

Petitioner's request for review of this issue should accordingly be rejected.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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